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14
15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION

18
19 EPIC GAMES, INC.,
20 Plaintiff, Counter-
21 defendant
22 v.
23 APPLE INC.,

24 Defendant,
Counterclaimant.

25 Case No. 4:20-cv-05640-YGR-TSH

26 **REPLY IN SUPPORT OF APPLE INC.'S
27 MOTION FOR AN ADVERSE
28 CREDIBILITY FINDING**

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PRELIMINARY STATEMENT

At trial, Epic presented testimony from as many witnesses associated with Microsoft as it did from Epic itself (five each). A reasonable observer might wonder whether Epic is serving as a stalking horse for Microsoft. Yet Microsoft shielded itself from meaningful discovery in this litigation by not appearing as a party or sending a corporate representative to testify. Instead, Epic called one Microsoft employee—Lori Wright—who testified in her personal capacity, as well as a series of Microsoft “consultants.” *See* Trial Tr. 1478:11–16 (Evans), 1797:10–1801:14 (Athey), 2322:22–2325:9 (Cragg), 2554:6–2555:2 (Mickens). Yet even as to Ms. Wright, Microsoft refused to produce the documents in her personal files, including a number of documents about which she testified at trial.

On April 12, 2021, this Court entered an order warning both Epic and Microsoft that “failure to produce relevant documents, including documents relevant to [Ms. Wright], to both parties (here, to Apple)” could result in an adverse credibility finding. Dkt. 437 at 4. The Court explained that Ms. Wright could avoid such a sanction by “ensur[ing] that [she] adequately and timely produce[d] such documents [at least three days] in advance of [her] deposition.” *Id.* Microsoft, however, did not produce Ms. Wright’s documents before she was deposed (or, for that matter, before she testified at trial).

In other words, on notice from this Court that it could produce Ms. Wright’s documents or subject her to an adverse credibility finding, Microsoft chose not to produce her documents. Epic similarly had the choice of whether to call Ms. Wright in light of Microsoft’s decision to withhold her documents. By this motion, Apple simply seeks to hold Epic and Microsoft—allied against Apple in this case from the temporary restraining order stage, *e.g.*, Dkt. 40—accountable for those choices. Apple submits that the only logical inference from the considered decisions of Epic and Microsoft, each ably assisted by respected counsel, is that the documents from Ms. Wright’s files were withheld because they would be detrimental to Epic’s case and supportive of Apple’s.

In their respective responses to Apple’s motion, Epic and Microsoft all but ignore the Court’s April 12 order, even though it is that order which Apple seeks to enforce here. Nor do they dispute that Ms. Wright failed to produce internal communications providing insight into Microsoft’s efforts to introduce the xCloud streaming service, discussions (including with Epic) about challenging the

1 Apple App Store rules, and a P&L statement for Xbox, even though she cited it as a basis for her
 2 understanding of Microsoft’s supposed hardware subsidies. And they do not dispute that these
 3 documents would have confirmed or refuted the testimony that she offered on these subjects.

4 Rather than address Microsoft’s conscious choice not to produce Ms. Wright’s documents, thus
 5 risking the very adverse credibility finding that Apple now seeks, Epic and Microsoft advance a series
 6 of other arguments in the apparent hopes that the Court will not adhere to its previous order. These
 7 arguments should be rejected, and the Court should enter an adverse credibility finding as to
 8 Ms. Wright’s testimony—just as it warned Microsoft and Epic that it would do if her documents were
 9 not produced.

10 **ARGUMENT**

11 Epic agrees that this Court has the authority to find Ms. Wright’s testimony not to be credible.
 12 Dkt. 648 at 10. The Court should exercise that authority here, where it is undisputed that Microsoft
 13 did not produce a single document following entry of this Court’s April 12 order, despite the explicit
 14 warning of the consequences of doing so. At that time, the Court expressed concern with being able
 15 “to measuredly consider and weigh the relevant evidence to reach a final determination.” Dkt. 437 at
 16 3. Ms. Wright’s trial testimony shows that this concern was well-founded, and neither Apple nor the
 17 Court have the documentary evidence with which to test the veracity of Ms. Wright’s assertions—even
 18 though that evidence was available in her own files.

19 First, Epic and Microsoft argue that Apple requested (and received) certain financial
 20 information from Microsoft but did not specifically ask for the Xbox P&L. Dkt. 648 at 8; Dkt. 691 at
 21 4. But the P&L was clearly relevant to Ms. Wright’s testimony, including because Ms. Wright
 22 referenced the P&L at her deposition as a basis for her testimony about Microsoft “subsidizing the
 23 consoles for the sake of the content revenue.” Dkt. 602-1 Ex. A at 123:1–2. Thus, even if there was
 24 any question whether the P&L was within the bounds of the “relevant documents” the Court urged
 25 Microsoft to produce on April 12, that question was resolved at the deposition. When Apple reached
 26 out to Microsoft after the deposition, Microsoft did not respond. Calandra Decl. ¶ 2. And when Apple
 27 finally connected with Microsoft a few days before trial, Microsoft was unwilling to even confirm
 28 Ms. Wright would appear at trial. Srinivasan Decl. ¶ 2. Microsoft’s argument that Apple unduly

1 waited until after the close of discovery to seek documents related to Ms. Wright, Dkt. 691 at 4, fails
 2 in light of the fact that Ms. Wright’s identity was not disclosed until after the close of discovery. Apple
 3 did not have the burden to guess which witness Microsoft would put forward. *See* Dkt. 691 at 3.
 4 Rather, Epic had the burden to disclose the “name” of the “individual” it would call at trial, Fed. R.
 5 Civ. P. 26, and Microsoft had the burden to produce relevant documents at least three days prior to
 6 Ms. Wright’s testimony. Dkt. 437 at 4.

7 Second, Epic argues that witnesses can testify at trial as to facts within their personal
 8 knowledge. Dkt. 648 at 10. But that has nothing to do with whether Apple (and the Court) has an
 9 opportunity to compare that testimony to the underlying documents—especially where, as here, the
 10 documents are a basis for the witness’s personal knowledge. Microsoft, for its part, insists that because
 11 Ms. Wright testified in her individual capacity, she “had no duty to collect documents for Apple.”
 12 Dkt. 691 at 1. But Microsoft conveniently ignores this Court’s order stating the opposite. The Court
 13 recognized that Microsoft had not produced any documents specifically relevant to Ms. Wright and
 14 reminded Ms. Wright of her obligation to “adequately and timely produce such documents [at least
 15 three days] in advance of [her] deposition.” Dkt. 437 at 4 & n.4. Instead, Ms. Wright testified—
 16 presumably with Microsoft’s blessing, if not its corporate imprimatur—on a financial question (the
 17 profitability of the Xbox console business) that is documented in her files, yet did not produce those
 18 documents.

19 Third, Epic argues that Apple had ample opportunity to conduct discovery at Ms. Wright’s
 20 deposition. Dkt. 648 at 5–6. But whether Apple had the opportunity to ask questions of Ms. Wright is
 21 distinct from whether Apple had received any documents that would allow it to test the veracity of
 22 Ms. Wright’s answers. That is what justifies the consequences for Ms. Wright’s failure to produce
 23 documents *before* her deposition. *See* Dkt. 437 at 4; *see also FDIC for Butte Cnty. Bank v. Ching*,
 24 2016 WL 8673035, at *4 (E.D. Cal. Oct. 14, 2016) (recognizing need for adequate document disclosure
 25 prior to deposition). Epic’s only response is that Apple failed to keep Ms. Wright’s deposition open.
 26 Dkt. 648 at 6. But the onus was on Ms. Wright, not Apple, to comply with her production obligations.
 27 And Apple *did* consistently seek relevant documents—in its original subpoena to Microsoft, and in the
 28 window between Epic’s identification of Ms. Wright and her deposition. Dkt. 419-3 ¶¶ 3, 5. In

1 response to Apple’s subpoena, Microsoft produced 79 documents. Dkt. 419-3 ¶ 4. Of these, none
 2 came from Ms. Wright’s emails and only two non-email documents came from her custodial file. *Id.*
 3 ¶ 6. Microsoft refused to produce additional documents in response to Apple’s pre-deposition request,
 4 *id.* ¶¶ 5–7, and refused to engage with Apple at all after Ms. Wright’s deposition. Calandra Decl. ¶ 2;
 5 Srinivasan Decl. ¶ 2.

6 Fourth, Epic argues that the playing field was even because Ms. Wright gave both Epic and
 7 Apple the same paltry document production. Dkt. 648 at 1. But the issue is not whether both Apple
 8 and Epic received the same documents—it is that Microsoft produced documents in a one-sided manner
 9 helpful to Epic, while withholding documents helpful to Apple. Just because documents were produced
 10 to both parties does not mean that the production was complete. Here, it obviously was not. In addition,
 11 it is apparent that Microsoft and Epic are coordinating behind the scenes, so Epic’s “level playing field”
 12 argument is entirely disingenuous. As any litigant knows, only the party adverse to the witness needs
 13 her documents to test the veracity and reliability of her testimony. Here, that party is Apple, as the
 14 Court’s order expressly indicates. Dkt. 437 at 4 (noting that the warning to produce Ms. Wright’s
 15 documents was especially important “(here, to Apple)”).

16 Fifth, Epic argues that Ms. Wright’s trial testimony was “predictable” based on her deposition
 17 testimony, and thus Apple was not surprised at trial. Dkt. 648 at 6. But Apple’s ability to depose
 18 Ms. Wright was itself hampered by Microsoft’s failure to produce in advance of the deposition (as
 19 contemplated by the Court’s April 12 order). Moreover, prevention of surprise is only one reason that
 20 witnesses are expected to comply with document production obligations. Another reason is to allow
 21 “the Court to measuredly consider and weigh the relevant evidence to reach a final determination.”
 22 Dkt. 437 at 3. Without the relevant documents underlying Ms. Wright’s testimony—both at her
 23 deposition and trial—this Court cannot measuredly consider and weigh the relevant evidence. This
 24 became especially apparent at trial when Ms. Wright made repeated references to the profitability of
 25 aspects of Microsoft’s business while withholding the precise documents that could have bolstered or
 26 belied her testimony.

27 Finally, Epic argues that Ms. Wright did not need to produce any documents reflecting
 28 correspondence between Microsoft and Apple because such correspondence is already in Apple’s

1 possession. Dkt. 648 at 7. For example, Epic used with Ms. Wright and moved into evidence PX-
 2 2311, which is an email between Ms. Wright and Apple discussing xCloud. But Apple's production
 3 of certain emails involving Ms. Wright and xCloud is beside the point.¹ Rather, the point is that Apple
 4 received *no internal Microsoft communications* providing insight into what Microsoft was actually
 5 thinking and saying about efforts to introduce xCloud or on any other subject about which Ms. Wright
 6 testified. Ms. Wright admits that such communications exist. Dkt. 602-1 Ex. A at 64:3–15. And there
 7 is no dispute that Microsoft withheld internal communications, whether from Ms. Wright or anyone
 8 else, on important issues including discussions with Epic about the hotfix, discussions (including with
 9 Epic) about challenging the Apple App Store rules, and submitting a declarations in support of Epic's
 10 motion for temporary restraining order and preliminary injunction motion. Such internal
 11 communications are particularly relevant in light of Microsoft's relationship with at least five Epic
 12 witnesses and the potential that Microsoft is using Epic as a proxy plaintiff in litigation that it refuses
 13 to prosecute in its own name.

14 CONCLUSION

15 The Court should make an adverse credibility finding as to Ms. Wright's direct examination
 16 testimony.

17 DATED: May 19, 2021

18 By

/s/ Jay Srinivasan

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27 ¹ That Epic used internal Apple emails on the subject of Ms. Wright's testimony leaves Apple only
 28 further prejudiced by Microsoft's decision to do likewise. So while Epic was able to cherry-pick
 internal Apple documents in support of its case, Epic and Microsoft ensured that Apple would have
 no corresponding opportunity.